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BEFORE THE ARIZONA CORPORATION COMMISSION

DOUG LITTLE CHAIRMAN	BOB STUMP COMMISSIONER	BOB BURNS COMMISSIONER
TOM FORESE COMMISSIONER	ANDY TOBIN COMMISSIONER	

IN THE MATTER OF THE APPLICATION OF TUCSON ELECTRIC POWER COMPANY FOR APPROVAL OF ITS 2016 RENEWABLE ENERGY STANDARD IMPLEMENTATION PLAN	DOCKET NO. E-01933A-15-0239
IN THE MATTER OF THE APPLICATION OF TUCSON ELECTRIC POWER COMPANY FOR THE ESTABLISHMENT OF JUST AND REASONABLE RATES AND CHARGES DESIGNED TO REALIZE A REASONABLE RATE OF RETURN ON THE FAIR VALUE OF THE PROPERTIES OF TUCSON ELECTRIC POWER COMPANY DEVOTED TO ITS OPERATIONS THROUGHOUT THE STATE OF ARIZONA AND FOR RELATED APPROVALS	DOCKET NO. E-01933A-15-0322 **THE ENERGY FREEDOM COALITION OF AMERICA'S REPLY BRIEF**

REPLY BRIEF

OF ENERGY FREEDOM COALITION OF AMERICA

June 24, 2016

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I. INTRODUCTION

TEP's brief essentially validates the majority of EFCA's arguments while further exposing the patent superficiality of its justifications and the real intentions behind its proposals. TEP essentially acknowledges the core anti-competitive aspects of its proposals, including that they depend upon cross-subsidies from the rate base that cannot be matched by third-party solar competitors.

TEP does not dispute that it is requesting a monopoly in the provision of community solar services to customers. TEP does not dispute that no third-party can offer customers long-term, fixed-rate contracts for the entirety of their electric service, regardless of the future costs to serve those customers (which is what TEP proposes to do in its TORS and RCS programs). TEP does not dispute that it can further exploit its intrinsic advantages over third-party solar when it inevitably expands its solar offerings. Given 1) TEP's admission regarding the scale advantages of utility-scale solar assets relative to its competitors' DG solar offerings; 2) its acknowledgement that it can liberally expand its RCS program either by re-classifying existing utility-scale capacity as "community solar" or by adding generation; and 3) its steadfast refusal to allow competitors to provide a true community solar offering, TEP's proposals clearly pose a dire threat to competition in a residential DG solar industry that TEP acknowledges is currently "robust." Because this outcome is clearly not in the public interest, and given that R14-2-1615(B) proscribes the direct delivery of competitive services by a regulated monopolist, TEP's proposals should be rejected as a matter of law.

TEP's customer choice arguments ring hollow against this backdrop. TEP offers no rebuttal to EFCA's core contention that if TEP has a meaningful value proposition to offer prospective solar customers, it can easily do so through a separate subsidiary subject to a code of conduct designed to preserve competition. TEP's contentions regarding the supposedly "modest" nature of its programs are belied by its admissions about how it can and will expand these programs to meet customer demand. TEP's REC compliance arguments are equally baseless. And TEP's cost-shift justification contradicts its contention that its proposals are designed to expand the market, while further exposing the true rationale for the TORS and RCS programs: the

cannibalization of third-party solar. For these reasons and the reasons set forth in EFCA's Post-Hearing Brief, TEP's proposals should be rejected.

II. TEP'S BRIEF DOES NOT DISPUTE THE MAJORITY OF EFCA'S ARGUMENTS

TEP's brief does not dispute most of the points EFCA has raised during this proceeding, including that:

- TEP intends to cross-subsidize both the TORS and RCS programs from its rate base, with the costs and risks associated with these programs being borne by captive rate-payers.

- TEP can exploit its rate base to offer customers fixed, long-term rates for their entire electrical needs that cannot be matched by third-party solar providers.

- Informational asymmetries resulting from TEP's status as a regulated monopolist would provide it with an unfair, anti-competitive advantage in targeting potential third-party solar customers.[1]

- TEP is requesting a monopoly in the provision of community solar power to consumers.

- TEP intends to expand the TORS and RCS programs as warranted by customer demand.[2]

- TEP can liberally add RCS capacity by reclassifying current utility-scale solar facilities as "community solar"[3] or by adding new facilities without any prior Commission approval and subject only to *ex post facto* prudency review.[4]

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[1]Gray Tr. Vol. III, at 607:7-21 (conceding that the utility would know who was "requesting installation and interconnections" to enable third-party solar facilities). When customers express interest in third-party solar, TEP immediately knows who they are and can target its marketing at them and at other similarly situated customers.
[2]*See* Yardley Tr. Vol. II, at 290:6-9.
[3]*See* Tilghman Tr. Vol. I, at 128:3-9.
[4]*See* TEP Initial Post Hearing Brief (hereafter TEP Br.) at 3:4-10.

- TEP is proposing to enter an industry which TEP itself describes as "robust" (i.e., competitive).[5]

- The Commission can and should consider the impact of TORS and RCS on competition in evaluating TEP's proposed programs.[6]

TEP thus concedes or admits essentially all of the predicate facts needed to support EFCA's assertion that TEP's proposals threaten to replace a currently competitive market with a TEP monopoly. TEP, in particular, avoids addressing the competitive implications of granting TEP a monopoly in the provision of community solar to consumers while also allowing TEP the ability to re-classify existing utility-scale solar facilities as "community solar" and/or to expand the community solar program by adding generation that will be evaluated only in a subsequent rate case. TEP's brief admits that solar is a scale industry and argues that community solar, which it wants to monopolize, is better positioned than rooftop solar to provide the necessary scale going forward.[7] TEP also does not dispute that it is uniquely positioned to dominate community solar due to its retail service monopoly. Thus, assuming that TEP's argument about community solar being better positioned than rooftop solar is true, it is hard to see competition from third-party solar surviving if TEP's proposed cross-subsidized community solar program is approved.

Against this backdrop, TEP's requested waiver from the current definition of "distributed generation" should be rejected. TEP should be required to come forward with a community solar proposal that is designed to accommodate competition and true, customer-facing, third-party participation in community solar rather than a proposal that simply allows TEP to relabel TEP-owned utility-scale assets as "community solar" DG assets.

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[5] *See id.* at 1:12-14.

[6] *See id.* at 7:25-8:2.

[7] *See id.* at 10:17-21. TEP is willing to accept Staff's purchase-power-agreement proposal because, by limiting third-party participation to wholesale generation, TEP can preserve its monopoly in providing customer-facing community solar services in its service territory. For this reason, as we discuss more fully below, this proposal does not adequately address EFCA's concerns about giving TEP a monopoly in the provision of community solar power to consumers.

III. TEP'S JUSTIFICATIONS FOR WHY ITS PROGRAMS ARE IN THE PUBLIC INTEREST ARE BASELESS

A. TEP's Proposals Will Not Enhance Customer Choice

TEP argues that its proposals will enhance "customer choice" by offering individuals within its territory additional solar options.[8,9] While TEP offers lip service to customer choice, it offers no explanation as to why it could not expand into DG solar, and offer such choices, through a separate subsidiary. In fact, all TEP can muster on this point is its wholly conclusory statement that a separate subsidiary is "unnecessary".[10] If TEP's programs will provide a meaningful value proposition for consumers, surely that value can be delivered through a separate subsidiary that would stand on its own without resorting to anti-competitive cross-subsidies. TEP's inability to meaningfully answer this point reveals the hollow nature of its customer choice argument and reinforces the conclusion that the true purpose of the TORS and RCS proposals is the elimination of competition in the DG solar segment in TEP's service territory.

TEP's customer choice argument is further belied by its indefensible failure to enable true, customer-facing third-party participation in its community solar proposal. TEP, RUCO and Staff all do not dispute that such participation could be accommodated under Arizona law. If TEP were truly interested in providing consumers with new choices, it would have designed its community solar proposal to enable meaningful third-party participation. Instead, consumers will have only one community solar choice under TEP's proposal: TEP's community solar monopoly. Importantly, and contrary to Staff's suggestion, even the addition of a purchase-power-agreement option would not introduce customer choice into community solar (as explained further below).

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[8] *See id.* at 3:4-10.

[9] TEP's reliance on *Paladin Assocs. v. Montana Power Co.*, 328 F.3d 1145 (9th Cir. 2003) for the uncontroversial proposition that providing customers with more choices is pro-competitive does nothing to advance its argument that its programs are not anti-competitive. *Paladin* did not involve a regulated monopolist threatening to subvert competition (and, thereby, to limit choice) in a competitive, unregulated market as TEP proposes to do here. Moreover, *Paladin* concluded that the restraint in question was no threat to competition because, among other things, the defendant did not have market power. *See Paladin,* 328 F.3d at 1158. That conclusion clearly is inapplicable here because TEP is proposing to exploit its power and advantages as a regulated monopolist to gain monopoly power in the DG solar segment.

[10] *See* TEP Br. at 8:7.

TEP fares no better with its claim that permitting TEP to use rate-based assets—namely TEP's currently unutilized land—to build community solar facilities is cost efficient.[11] As Dr. DeRamus explained, TEP's exploitation of information or assets that are uniquely in its possession due to its regulated monopoly would not enhance efficiency.[12] If it were efficient to exploit those assets, TEP should be able to competitively supply community solar through a separate subsidiary that would be charged a market rate for such assets.[13] Certainly that outcome would be better for TEP's rate-payers—including those that don't participate in TEP's community solar program—because the entire rate base would get fair market value for the TEP assets that are deployed in support of the program. Additionally, if using such assets truly enhances efficiency, requiring a separate subsidiary to pay for them should not impact the program's competitive viability. If such charges would render the program non-viable in the competitive market, then it is clear that using them would not enhance efficiency. At bottom, what TEP claims are efficiencies are nothing more than anti-competitive cross-subsidies that should not be permitted.

Lastly, to salvage its patently superficial customer choice argument, TEP denies that its programs will likely eliminate choice by replacing the competitive DG solar industry with a TEP monopoly because its proposals are "modest".[14] But TEP has acknowledged that its real intentions far exceed these "modest" proposals. TEP admits that it can re-classify current utility scale solar capacity as community solar[15] and that it intends to add capacity to meet customer demand[16]. TEP also admits that over 5,000 customers—a figure that exceeds the approximately 4,000 applications that TEP received from the solar industry in 2015[17]—have already expressed interest in the TORS

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[11] *See id.* at 13:2-7. On a related point, TEP mistakenly relies on *Catlin v. Washington Energy Co.*, 791 F.2d 1343 (9th Cir. 1986) to support its suggestion that "[t]here is nothing anticompetitive" with regard to TEP using "efficiencies or lawful advantages that result from the size or scope of [TEP's] operations to offer better priced or better quality products to consumers." *See* TEP Br. at 7:3-7. *Catlin* is inapposite because the appellants in *Catlin* failed to show that the regulated utility was acting with the requisite, impermissible intent to leverage its monopoly over the natural gas market to eliminate competition in the vent damper market. *See Catlin*, 791 F.2d at 1348-49. Indeed, the appellants in *Catlin* failed to offer any evidence of "'unfair or predatory conduct.'" *Id.* at 1348 (internal citation omitted). In contrast, EFCA has powerfully demonstrated that TEP's proposals are designed to extend its regulated monopoly into the provision of DG solar in its service territory.

[12] *See* Deramus Direct Test., EFCA Ex. 20, at 12:4-13.

[13] *See* Deramus Direct Test., EFCA Ex. 20, at 2:24-3:10.

[14] *See* TEP Br. at 4:14-17.

[15] *See* Tilghman Tr. Vol. I, at 128:3-9.

[16] *See* Yardley Tr. Vol. II, at 290:6-9.

[17] Tilghman Rebuttal Test., TEP Ex. 2, at 11:4-6.

program.[18] Most importantly, TEP admits that its community solar monopoly will have material scale advantages over rooftop solar—advantages that will be magnified exponentially if TEP is permitted to offer that monopoly service at cross-subsidized, long-term fixed rates.[19] In sum, TEP's arguments about the supposed modesty of its proposals are a ruse designed to obscure its true intention: the elimination of competition from third-party solar.

B. *Ex Post Facto* Commission Review Likely Will Not Mitigate The Anti-competitive Impact Of The TORS And RCS Programs

TEP suggests that it "will have to return to the Commission each time it want[s] to add dollars or customers," implying that it cannot expand TORS and RCS without receiving the Commission's prior approval.[20] But TEP contradicts itself by admitting that it can supplement these programs by adding more generation without receiving prior Commission approval whenever it wants.[21] Furthermore, TEP's brief belies its arguments that *ex post facto* review by the Commission can meaningfully limit the anti-competitive impact of its programs when TEP argues that customer demand should justify the TORS expansion and the proposed RCS program.[22] If this argument is accepted, then TEP inevitably will be able to justify any expansion to the TORS and RCS programs by pointing to the demand generated by cross-subsidized, fixed-rate offerings that no third party can match. Moreover, if third-party solar is ejected from the marketplace between rate cases because of a dramatic expansion of the TORS or RCS programs, it will be virtually impossible for the Commission to later rectify that outcome. At the end of the day, TEP's proposals have been designed to create irreversible momentum behind its programs—particularly the RCS program—that will likely eliminate competition in DG solar in its service territory.

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[18]Tilghman, Direct Test., TEP Ex. 1, at 17:16-20.

[19]Notably, nowhere in this proceeding did TEP ever address another material risk it intends to inflict on rate-payers – the risk that its community solar investments will be under-utilized. This presumably reflects the fact that TEP does not view this as a material risk because it anticipates expanding its community solar program to meet consumer demand. This demand will inevitably develop because no third-party could possibly match TEP's offering of a long-term, fixed-rate for all electric service.

[20]*See* TEP Br. at 6:11-12.

[21]*Id.* at 3:4-10.

[22]*See id.* at 1:9-12

C. TEP Is Proposing To Do Much More Than To Simply "Add Generation"

TEP's next sleight of hand is to argue that its programs should be approved because there is nothing untoward about it owning "generation assets, including solar generation assets."[23] This framing is designed to hide the fact that TEP is proposing to do much more than merely add solar generation. In reality, it proposes 1) to add customer-specific, residential solar generation to its rate base; 2) to gain the ability to re-classify utility-scale solar assets as "community" DG solar assets; and 3) to sell cross-subsidized, long-term fixed-rate offerings to customers in direct competition with third-party solar. This plan will shift all of the risks of TEP's programs onto captive rate-payers, and, as noted above, poses a material threat to the currently "robust" third-party solar industry.

D. TEP's Cost-Shift Justification Contradicts Its Argument That Its Programs Will Not Eliminate Competition From Third-Party Solar

TEP's defense of its proposals ultimately boils down to a single proposition—that they would "result in *lower* prices and *less* cost shifting than under the current net metering regime."[24] (emphasis in the original). As an initial matter, TEP's cost-benefit analysis omitted major costs of its proposals—particularly the cost associated with existing assets—as Mr. Beach demonstrated at trial.[25] For this reason alone, TEP's discussion of the supposed cost-shift should be disregarded.

Moreover, TEP's cost-shift justification is at odds with TEP's contention that its programs will expand the market[26]—which is TEP's way of (falsely) suggesting that its programs will not materially impact third-party solar. TEP cannot have it both ways. If its programs are truly designed to expand the market—which we doubt—then they should be rejected because they needlessly will be increasing costs for all rate-payers while promoting TEP's anti-competitive scheme. Any additional TORS or RCS unit that does not replace a similar unit of third party solar will increase the cost to all rate-payers regardless of how much the TORS or RCS unit itself costs. If the supposed cost-shift is such a problem for TEP—a suggestion we reject—then why is it

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[23] *See* TEP Br. at 7:13-14.
[24] *See id.* at 8:2-5
[25] Beach Tr. Vol. II, at 446:9-447:8.
[26] *See id.* at 3:14-16.

appropriate for TEP to increase the cost-shift dramatically by making its monopolistic community solar offering available to a much larger universe of customers?

On the other hand, if these programs are really targeted at eliminating third-party solar—as their design clearly indicates[27]—then they should be rejected because they threaten to replace a competitive, well-functioning industry with a TEP monopoly.[28] At the end of the day, TEP cannot escape the conclusion that the only way its claim that TORS and RCS will reduce the cost-shift could possibly be true is if these programs cannibalize third-party solar in TEP's service territory. Once again, TEP's real motivation here is exposed by its superficial justifications for these programs.

E. Compliance With REC Requirements Is Not A Valid Justification For The TORS And RCS Programs

TEP continues to argue that TORS and RCS are necessary to enable TEP to achieve compliance with the REC requirements, even though Staff has emphatically stated that compliance with the REST rules should not factor into determining if TEP's proposals are in the public interest.[29] Moreover, as EFCA's Post-Hearing Brief highlights, under Commission precedent TEP can comply with the REST rules by citing market conditions—namely the activity generated by the DG solar industry that its brief admits is "robust"—to justify the grant of a waiver that would involve no compliance costs.[30] Even if TEP could not receive a waiver, the purchase of renewable energy credits is a far less expensive alternative than expanding TORS and instituting RCS to achieve compliance.

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[27]In this regard, TEP has offered no coherent justification for its decision to limit these programs to homeowners.

[28]To suggest that TORS is truly incremental, TEP offers the entirely conclusory and unsupported contention that "some TORS customers would not have qualified for solar leases or are not comfortable with the lease paradigm." TEP Br. at 5:6-7. Since TEP has offered no support for this contention, it should be disregarded.

[29]*See* Gray Tr. Vol. III, at 580:14-19

[30]*See* EFCA Post-Hearing Br. at 8:15-9:3. TEP misstated Dr. Cicchetti's testimony by suggesting that he argued that a waiver would not be necessary. TEP Br. at 14:11-13. In fact, he argued that TEP's proposed TORS expansion should be denied precisely because a waiver would involve "no cost to 'other' rate-payers" and is therefore more aligned with the Commission's preference for "'no cost or least cost' compliance." *See* Cicchetti Responsive Test., EFCA Ex. 17 at 2:4-26.

IV. TEP'S PROPOSALS SHOULD BE REJECTED AS A MATTER OF LAW

A. Arizona Law Precludes TEP From Directly Offering Competing Services

Pursuant to its plenary rate-making authority, the Commission can prohibit TEP from directly providing services that compete with third-party solar providers. Although *Phelps Dodge* struck down various Commission rules as beyond the Commission's authority, it left R14-2-1615(B) (precluding utilities from offering competitive services directly) and R14-2-1616 (prescribing guidelines for a code of conduct to be applied whenever a utility provides competitive services through a separate affiliate "to prevent anti-competitive activities") intact. Thus, *Phelps Dodge* 1) underscored that the Commission's regulatory power includes the ability to prevent a utility from offering competitive services directly, and 2) affirmed the Commission's power to proscribe anti-competitive activity when a utility's affiliate is participating in the competitive market. This reinforces the conclusion that TEP's proposals should be rejected as a matter of law.

In its brief, TEP admits that DG solar is a competitive segment. Therefore, the only way TEP can legally expand into DG solar beyond the limited TORS pilot is by submitting a revised proposal in which it proposes to offer competitive DG services via a separate subsidiary, and in which both TEP and its subsidiary will be subject to a code of conduct pursuant to R14-2-1616.[31]

B. The Commission Can Enable Third-Party Participation In TEP's Solar Programs Via Sleeving Or Virtual Net Metering

TEP purposefully designed its proposals to preclude meaningful third-party participation in its community solar program. Both RUCO and Staff have joined EFCA in criticizing TEP for its failure to accommodate third-party participation in its community solar program.[32] TEP failed

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[31]Staff's brief notes that *Phelps Dodge* struck down R14-2-1615(A) in support of the proposition that the Commission lacks the authority to require TEP to offer competitive DG solar services via a separate subsidiary. *See* Staff Opening Brief at 17:9-21. But Staff avoids any discussion of R14-2-1615(B)--which *Phelps Dodge* deliberately left intact. This provision gives the Commission the power to reject TEP's proposal outright for offering competitive services through its regulated monopoly. Staff also concedes that R14-2-1616 is still "on the books." *Id.* at 17:17-19. Despite Staff's implication to the contrary, if TEP chooses to submit a new proposal involving a separate subsidiary, the *Phelps Dodge* court's choice to leave R14-2-1616 intact makes clear that the Commission can impose a code of conduct to preserve competition. *See id.* at 17:9-21. Against this backdrop, Staff's weak contention that "this scheme ... perhaps demonstrates that TEP is permitted to compete" in DG solar makes little sense and should be disregarded. *Id.* at 17:19-21.

[32]*See* Huber Direct Test., RUCO Ex. 1, at 5:1-9; *see also* Gray Direct Test., S. Ex. 1, at 16:19-22, 17:9-20.

to make either sleeving or virtual net metering a feature of its RCS program, despite the fact that both are viable options for enabling meaningful third-party participation. TEP's brief does not dispute the fact that a virtual net metering or sleeving approach that would enable a customer-facing relationship for third-party community solar providers is permissible under Arizona law.

Staff acknowledges the absence of any legal bar to virtual net metering or sleeving in its Opening brief.[33] Although Staff recommends modification of the RCS program "to alleviate EFCA's concerns about the RCS program being anticompetitive and monopolistic,"[34] its proposed modification will codify TEP's community solar monopoly as opposed to actually opening up the solar market to customer-facing competition. Specifically, Staff's proposed modification would codify TEP's community solar monopoly by limiting third-party participation to purchase-power-agreement arrangements where TEP would acquire third-party-generated community solar power for resale to consumers. This construct would eliminate customer choice by enshrining TEP as the only community solar provider with customer-facing relationships. Given the acknowledgment of all parties to this proceeding that sleeving and/or virtual net metering arrangements can be created to offer consumers real choices in community solar, we respectfully request that Staff's proposal to approve a modified version of RCS be disregarded.

V. CONCLUSIONS AND RECOMMENDATIONS

For the reasons set out above, the Commission should take the following actions.

(1) Reject TEP's Application to expand its TORS program beyond the 600 homes authorized in Order 74884 as not being in the public interest;

(2) Reject TEP's Application to establish the RCS program as not being in the public interest and thereby remove consideration of proposed Rider R-17 from TEP's rate case; and

(3) Find that no good cause exists for granting a waiver of the definition of "distributed generation" as contained in the Commission's REST Rules R14-2-1801(E), R-14-2-1801(G), and R-14-2-1802(B).

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[33] *See* Staff Opening Brief at 15:19-21.
[34] *See id.* At 11:20-21.

RESPECTFULLY SUBMITTED this 24th day of June 2016.

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